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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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HOOSIER ENVIRONMENTAL COUNCIL,  
*Complainant,*

v.

CARROLL COUNTY AREA PLAN COMM'N,  
*Respondent.*

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Formal Complaint No.  
17-FC-251

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Carroll County Area Plan Commission (“APC”) violated the Access to Public Records Act<sup>1</sup> (“APRA”). Executive Director Douglas A. Wagner responded on behalf of the APC. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on October 30, 2017.

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<sup>1</sup> Ind. Code §§ 5-14-3-1 to -10

1.

**BACKGROUND**

The Hoosier Environmental Council (“HEC”), by and through Senior Staff Attorney Kim Ferraro, filed a formal complaint alleging the Carroll County APC violated APRA by wrongfully withholding access to public records and by charging an impermissible fee for access.

On June 9, 2017, HEC submitted a written public records request to the APC seeking the following:

1. All approvals of zoning requests (i.e., special exceptions, variances, rezones, improvement location permits, pre-application and/or building permits, etc...) to allow construction of new confined feeding operations (CFOs) or concentrated animal feeding operations (CAFOs) or to expand existing CFOs and CAFOs from 2007 to the present date;
2. All denials of zoning requests prohibiting the construction of new CAFOs or CFOs or the expansion of existing CFOs and CAFOs issued from 2007 to the present date;
3. All documents including but not limited to written communications between any APC or BZA staff, agent or member and other persons regarding the following:
  - a. plans to build a CAFO on property at CR 500 S and US 421, Bringhurst, Indiana (“the planned CAFO”);
  - b. persons opposed to the planned CAFO;

- c. the planned CAFO's compliance or lack of compliance with zoning requirements;
  - d. Steve Bough and/or Lisa Bough who reside at 5316 W 500 S, Bringham, Indiana;
  - e. Steve Bough's business, occupation or employment;
  - f. the Notice of Property Use Violation dated November 9, 2016 issued to Steve and Lisa Bough;
  - g. the basis for issuing the Notice of Property Use Violation of November 9, 2016 to Steve and Lisa Bough;
4. The complaint received by the APC and/or BZA alleging that Steve and Lisa Bough were operating a business from their residence;
  5. All documents regarding the investigation into the complaint alleging that Steve and Lisa Bough were operating a business from their residence;
  6. All notices of property use violations issued against any and all Carroll County residents since 2007 to the present date for operating a business from their residence;
  7. All home occupation permits that have been applied for, granted, and/or denied from 2007 to the present date.

On June 15, 2017, the APC responded by letter to the HEC stating that many of the records responsive to the request had been collected. The APC indicated the total cost for the records to be \$102.00. In addition, the APC provided the following itemized costs:

\$80.00 for time spent scanning some of the records to electronic format and copying others to CD;

\$5.00 for the CD and \$2.00 for each file (\$12.00);

\$5.00 for mailing.

The APC stated that it would mail the responsive records upon receiving payment. The APC also asserted that some of the requested records would need to be retrieved from stored files, and the agency would conduct that search at a rate of \$40 per hour.

On June 29, 2017, the HEC responded with the payment of \$102.00, but also advised the APC that charging \$40 per hour search fee to fulfill the rest of its request violated APRA, specifically Indiana Code section 5-14-3-8(b). The HEC also requested the APC comply fully with APRA.

On July 11, 2017, the HEC received a disc containing records responsive to the remainder of its records request and a receipt for the \$102.00 payment. After review, the HEC determined that the records the APC provided were not complete.

As a result, the HEC sent a follow-up letter on August 3, 2017, identifying the records that had not been provided and renewed its request for those missing records, and requested additional documents. Specifically, the HEC sought an email dated August 10, 2016 from John Thomas with the APC of Tippecanoe County to APC Director Wagner. The APC produced that email in response to the HEC's request for records related to the APC's decision to issue a *Notice of Property Use Violation* to its clients Steve and Lisa Bough. The email identifies an attachment entitled *Infosource Employment Data* regarding the Boughs. HEC contends the APC improperly omitted the attachment and subsequently refused to produce the attachment on the basis that the APC had not purchased the appropriate rights to the data.

The HEC then filed a formal complaint with this Office on October 30, 2017.

On November 21, 2017 the APC filed its response to the complaint. The APC contends that all responsive information that could be located has been turned over to the HEC. Further, the APC acknowledges that it did not locate

any emails or other written communications between board members of the Carroll County Board of Zoning Appeals or the APC as requested.

## **2.**

### **ANALYSIS**

The Hoosier Environmental Council (“HEC”) contends that the Carroll County Area Plan Commission (“APC”) violated the Access to Public Records Act (“APRA”) by refusing to produce the *Infosource Employment Data*, and charging an improper fee to complete a records request. Each issue will be addressed in turn.

#### **2.1 The Access to Public Records Act**

The public policy underlying APRA states, “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1. APRA states that any person has the right to inspect and copy a public agency’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

The Carroll County APC is a public agency for the purposes of the APRA; and thus, subject to the Act’s disclosure requirements. Ind. Code § 5-14-3-2(n). Therefore, unless an exception applies under section 4, any person has the right to inspect and copy the APC’s public records.

##### **2.1.1 Public Record**

The HEC contends that the APC’s refusal to disclose the *Infosource Employment Data* regarding its clients violates

APRA. The APC stated that it lacked the “appropriate rights to the data;” and thus, it did not disclose the information. The HEC argues that this information constitutes a public record under APRA. Under APRA, *public record* means the following:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). The HEC argues that the *Infosource Employment Data* is a public record because it has been received by the APC. Further, the HEC asserts that none of APRA’s mandatory or discretionary exceptions to disclosure permit the APC to withhold the record from public disclosure.

In its response, the APC does not mention—far less dispute—the HEC’s argument that the record at issue is a public record that should be disclosed.

Notably, based on the evidence submitted, this Office is not privy to the specific information contained in this particular record, so it is difficult to determine with any sort of precision if all, some, or none of the record may be withheld under APRA.

The parties seem to agree that the *Infosource Employment Data* attachment has been received by the APC. That satisfies the public record definition, which leaves only the issue

of whether the record is excepted from the general rule of disclosure.

Whether the record is disclosable or able to be withheld is a separate issue. As a general matter, under APRA public records are presumptively disclosable unless an exclusion or exception applies under Indiana Code section 5-14-3-4.

Here, the APC has not cited any legal authority permitting it to withhold the *Infosource Employment Data* record from disclosure.

What is more, if a public record contains both disclosable and nondisclosable information, APRA requires the public agency to separate the material that may be disclosed and make it available for inspection and copying. *See* Ind. Code § 5-14-3-6.

Therefore, if there is an applicable disclosure exception that authorizes the APC to withhold this record or part of it, the APC did not reference it in the original denial or its response to this Office. Although an exception to disclosure *could* conceivably apply here depending on the contents of the record, the APC has not raised the issue and this Office will not make arguments on behalf of a public agency.

Accordingly, without an applicable exception, APRA presumptively requires disclosure of public records. The APC should be mindful of this going forward.

### **2.1.2 Search Fees**

Generally, APRA prohibits a public agency from charging any fee to inspect a public record; or to search for, examine,

or review a record to determine whether the record may be disclosed. Ind. Code § 5-14-3-8(b)(1), -(2).

Plainly enough, based on the evidence filed with this Office, it is clear that the APC charged the HEC \$80.00 for “time spent scanning some of the records to electronic format and copying others to CD.” What is more, the APC also declared that it would charge \$40-per-hour for “time going through the hard files searching for the requested information and scanning to electronic format plus any mailing and CD expenses.”

APRA expressly prohibits such action by a public agency. Therefore, an APRA violation has occurred in this case. Still, the APC appears to recognize this error based on its action it has taken to refund the \$80.00 to the HEC. In the future, the APC should be aware of APRA’s general prohibition on search fees to avoid further violations.



## **CONCLUSION**

Based on the foregoing it is the opinion of the Public Access Counselor that the Carroll County Area Plan Commission violated the Access to Public Records Act regarding search fees.

A handwritten signature in black ink, appearing to be 'LHB', written in a cursive style.

**Luke H. Britt**  
Public Access Counselor